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**Phoenix Finishing, Inc. and Luisa Robinson and Gloria Benitez.** Cases 13–CA–44809 and 13–CA–44852

August 12, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge and amended charge filed by employee Luisa Robinson on July 10 and October 9, 2008, respectively, and a charge filed by employee Gloria Benitez on August 6, 2008, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on October 30, 2008, against Phoenix Finishing, Inc. (the Respondent), alleging that it had violated Section 8(a)(3) and (1) of the Act.

Subsequently, the Respondent and the Charging Parties entered into a settlement agreement, which was approved by the Regional Director for Region 13 on March 10, 2009. Among other things, the settlement agreement required the Respondent to (1) post a notice to employees; (2) offer Louisa Robinson reinstatement to her former position; and (3) pay Robinson and Benitez backpay in the amounts of \$8800 and \$4200, respectively, to be paid in four monthly installments of \$2200 to Robinson and \$1050 to Benitez from March 13 to June 13, 2009.

The settlement agreement also contained the following provision:

[I]n a case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, including but not limited to, failure to make timely installment payments of moneys, and after 15 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by Charged Party, the Regional Director shall issue complaint in the instant case, *(or, if the Regional Director has withdrawn the complaint pursuant to the terms of this Settlement Agreement, the Regional Director shall reissue the complaint previously filed in the instant case)*. Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the just issued complaint concerning the violations alleged therein. Charged Party understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it would not contest the validity of any such allegations,

and the Board may enter findings, conclusions of law, and an order on the allegations of the aforementioned complaint. On receipt of said motion for summary judgment the Board shall issue an Order requiring the Charged Party to Show Cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party defaulted upon the terms of this settlement agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an Order providing full remedy for the violations found as is customary to remedy such violations, including but not limited to provisions of this Settlement Agreement. The parties further agree that the Board Order and a U.S. Court of Appeals Judgment may be entered hereon ex parte. [Emphasis in original.]

By letter dated April 16, 2009, the Deputy Regional Attorney for Region 13 advised the Respondent that it was in default of the settlement agreement because it had failed to remit the payment due on April 13, 2009.<sup>1</sup> The letter further advised the Respondent that if it did not cure the default within 15 days, the Deputy Regional Attorney would recommend to the Regional Director that proceedings be immediately instituted to obtain a money judgment for the full amount owing. By letter dated May 4, 2009, the compliance officer for Region 13 advised the Respondent that: (1) Joel Aronson (the Respondent's president) left a voice mail message with the Region explaining that the Respondent would not be making its required payments or any portion of that amount owed pursuant to the terms of the settlement agreement; (2) the Respondent has paid \$1050 toward the backpay owed to Benitez and \$2200 toward the backpay owed to Robinson; and (3) on receipt of the Board's Order granting the General Counsel's Motion for Summary Judgment, the Region will reevaluate the full amount of backpay owed and seek the full remedy, less any payments received. The Respondent failed to cure its default. Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on June 8, 2009, the Regional Director for Region 13 reissued the complaint.

<sup>1</sup> According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent has properly offered Robinson reinstatement and posted the agreed-upon notice pursuant to the terms of the settlement agreement.

On June 11, 2009, the General Counsel filed a Motion for Summary Judgment with the Board. Thereafter, on June 16, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

#### Ruling on Motion for Summary Judgment<sup>2</sup>

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent has failed to comply with the financial terms of the settlement agreement by failing to remit the agreed-upon amounts due employees Louisa Robinson and Gloria Benitez. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the reissued complaint are true.<sup>3</sup> Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, an Illinois corporation, with an office and place of business in Bensenville, Illinois (the Respondent's facility), has been engaged in the business of painting, powder coating, and silk screening of metal, glass, and plastic parts.

During the calendar year preceding issuance of the reissued complaint, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its facility goods, products, and materials valued in excess of \$50,000 from other enterprises located within the State of Illinois, each of which other enterprises had received these goods directly from points outside the State of Illinois.

<sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

<sup>3</sup> See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

Giovany Valadez	Supervisor
Bradley Aronson	Owner
Ann Sebastiano	Confidential employee

1. (a) About June 2 or June 9, 2008, the Respondent, by Giovany Valadez, at the Respondent's facility, threatened its employees with plant closure if the employees elected a union to represent them.

(b) About June 9, 2008, the Respondent, by Giovany Valadez, at the Respondent's facility, threatened to rehire any employees whom he got rid of because they formed, joined, or assisted a union.

2. (a) About April 25, 2008, the Respondent, by Bradley Aronson and Ann Sebastiano, at the Respondent's facility, laid off and/or discharged its employees Luisa Robinson and Gloria Benitez.

(b) The Respondent engaged in the conduct described above because Robinson and Benitez joined, supported, or assisted a union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

##### CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraph 2, the Respondent has been discriminating in regard to the hire or tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

##### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by laying off and/or discharging Louisa Robinson and Gloria Benitez on April 25, 2008, we shall order the Respondent to make Louisa Robinson and Gloria Benitez whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them.

In this regard, the Respondent agreed in the settlement agreement to pay Louisa Robinson \$8800 and Gloria Benitez \$4200 in backpay to be distributed into four monthly installments of \$2200 to Robinson and \$1050 to Benitez, with interest, to cover the period from their terminations to the effective date of the settlement agreement. As indicated above, the Respondent has paid backpay in the amounts of \$1050 to Benitez and \$2200 to Robinson. The General Counsel's motion states that there is an outstanding balance in the amount of \$3150 owed to Benitez and \$6600 owed to Robinson. Accordingly, we shall order the Respondent to immediately remit these amounts to the Region for payment to Robinson and Benitez.

We find, however, that the backpay due Robinson and Benitez should not be limited to these amounts. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an Order providing full remedy for the violations found as is customary to remedy such violations, including but not limited to provisions of this Settlement Agreement." Thus, under this language, it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expungement of the Respondent's personnel records, and notice posting.<sup>4</sup>

The additional backpay due Louisa Robinson and Gloria Benitez shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup>

<sup>4</sup> See *L.J. Logistics, Inc.*, 339 NLRB 729, 730 (2003). The General Counsel states in his Motion for Summary Judgment that the Respondent has offered Louisa Robinson reinstatement and posted the notice required by the settlement agreement. Although there is no indication that the settlement agreement provided a reinstatement remedy for Gloria Benitez, the settlement has been set aside. Thus, we shall order the Respondent to offer Benitez reinstatement as part of the customary remedy for her unlawful layoff and/or discharge. In addition, although the Respondent has posted the notice required by the settlement agreement, the settlement notice differs in material respects from the notice that is warranted in view of our findings and Order herein. Accordingly, we find that a notice-posting remedy is appropriate here.

<sup>5</sup> In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this

time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

However, because we shall order the Respondent to pay the damages remaining under the settlement agreement, the applicable backpay period will commence on March 10, 2009, the day the Regional Director approved the settlement agreement. We find it necessary to impose this limitation to prevent an unintended double recovery for the period running from the date that the employees were laid off and/or discharged to the effective date of the settlement agreement.

We shall also order the Respondent, if it has not already done so, to offer Louisa Robinson and Gloria Benitez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Further, the Respondent shall be required to remove from its files any reference to the unlawful layoffs and/or discharges of Louisa Robinson and Gloria Benitez, and to notify them in writing that this has been done and that the unlawful layoffs and/or discharges will not be used against them in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, Phoenix Finishing, Inc., Bensenville, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening employees with plant closure if employees elected a union to represent them.

(b) Threatening to refuse to rehire any employees whom the Respondent got rid of because they formed, joined, or assisted a union.

(c) Laying off and/or discharging employees because they join, support, or assist a union, or engage in concerted activities, or to discourage employees from engaging in these activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to Region 13 the payments of \$6600 owed to Louisa Robinson and \$3150 owed to Gloria Benitez, to be disbursed in accordance with the March 10, 2009 settlement agreement, and make those employees whole for any loss of earnings and other benefits suffered since March 10, 2009, as a result of the Respondent's unlawful actions against them, with interest, as set forth in the remedy section of this decision.

time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

(b) Within 14 days from the date of this Order, if it has not already done so, offer Louisa Robinson and Gloria Benitez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and/or discharges of Louisa Robinson and Gloria Benitez and, within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful layoffs and/or discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bensenville, Illinois, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2008. In addition, pursuant to the terms of the settlement agreement, the notice shall be posted in English and Spanish.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 12, 2009

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with plant closure if you elect a union to represent you.

WE WILL NOT threaten to refuse to rehire any employees whom we got rid of because the employees formed, joined, or assisted a union.

WE WILL NOT lay off and/or discharge you because you join, support, or assist a union, or engage in concerted activities, or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit to Region 13 the payments of \$6600 owed to Louisa Robinson and \$3150 owed to Gloria Benitez, to be disbursed in accordance with the March 10, 2009 settlement agreement, and make those employees whole for any loss of earnings and other benefits suffered since March 10, 2009, as a result of the Respondents' unlawful actions against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, if we have not already done so, offer Louisa Robinson and Gloria Benitez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially

equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs and/or discharges of Louisa Robinson and Gloria Benitez, and WE WILL, within 3 days thereafter,

notify them in writing that this has been done and that the unlawful layoffs and/or discharges will not be used against them in any way.

PHOENIX FINISHING, INC.